

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

MONDAY, THE 19TH FEBRUARY 2007 / 30TH MAGHA 1928

OP.No. 33868 of 2001(F)

PETITIONER:

**ABLE K.KAKKOOR,
KULANGASSERIL HOUSE,
KAKKOOR P.O.
REP. BY HIS POWER OF ATTORNEY,
GEORGE JOSEPH, MUNDIKKUDIYIL HOUSE,
KOZHIPPILLY P.O, KOTHAMANGALAM,
ERNAKULAM DISTRICT.**

**BY ADV. SRI.B.GOPAKUMAR
SMT.CHINCY GOPAKUMAR**

RESPONDENTS:

- 1. STATE OF KERALA,
REP. BY ITS SECRETARY TO
IRRIGATION DEPARTMENT,
GOVERNMENT OF KERALA,
SECRETARIAT,
THIRUVANANTHAPURAM.**
- 2. DISTRICT COLLECTOR,
COLLECTORATE, ERNAKULAM.**
- 3. EXECUTIVE ENGINEER,
IRRIGATION DIVISION,
ERNAKULAM, KAKKANAD.**
- 4. ASSISTANT EXECUTIVE ENGINEER,
IRRIGATION SUB DIVISION,
ERNAKULAM.**

BY GOVERNMENT PLEADER SRI.SANDESH RAJA

**THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON
19/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

OP NO. 33868/2001

APPENDIX

PETITIONER'S EXHIBITS

**EXT.P1: TRUE EXTRACT COPY OF RE-TENDER NOTICE UNDER
REFERENCE NO.T.N.1/95-96 DATED 5.5.1995.**

EXT.P2: TRUE COPY OF LETTER NO.A3.401/94-96 DATED 14.3.1996.

**EXT.P3: TRUE COPY OF ORDER NO.A3-491/94 DATED 28.3.96 OF THE
3RD RESPONDENT.**

**EXT.P4: TRUE COPY FO POWER OF ATTORNEY OF THE PETITIONER
DATED 28.3.1996.**

**EXT.P5: TRUE COPY OF THE LETTER NO.A3-491/94 DTED 18.4.96
ISSUED BY THE 3RD RESPONDENT TO THE PETITIONER.**

**EXT.P6: TRUE COPY OF THE NOTICE DATED 25.10.96 OF THE 2ND
RESPONDENT.**

**EXT.P6(a): TRUE COPY OF THE PROCEEDINGS OF THE 2ND RESPONDENT
DATED 6.12.96.**

**EXT.P6(b): TRUE COPY OF THE JUDGMENT IN O.P.NO.12233/96-F DATED
17.9.96 OF THIS HON'BLE COURT.**

**EXT.P7: TRUE COPY OF WRITTEN COMPLAINT TO THE HON'BLE
MINISTER IN CHARGE OF IRRIGATION DEPARTMENT OF THE 1ST
RESPONDENT ON 7.5.97.**

EXT.P8: TRUE COPY OF COMMUNICATION DATED 12.6.97.

**EXT.P9: TRUE COPY OF THE REPRESENTATION SUBMITTED BEFORE THE
2ND RESPONDENT ON 1.2.2000 BY THE PETITIONER.**

**EXT.P10: TRUE COPY OF JUDGMENT DATED 15.11.2000 IN OP
32044/2000-M BY THIS HON'BLE COURT.**

**EXT.P11: TRUE COPY OF NOTICE DATED 2.7.2001 ISSUED BY THE
ADDITIONAL SECRETARY TO GOVERNMENT TO THE POWER OF ATTORNEY
HOLDER OF THE PETITIONER.**

**EXT.P12: TRUE COPY OF GOVERNMENT ORDER G.O(RT)
NO.804/2001/IRD DTD. 3.8.2001.**

EXHIBITS OF R3

**EXT.R3(a): ORIGINAL STENCIL COPY OF TENDER NOTICE NO.1/95-96
DATED 5.5.1995.**

EXT.R3(b): ORIGINAL ACKNOWLEDGEMENT FOR HANDING OVER THE SITE

ORDER IN C.M.P.NO.55268 OF 2001 IN OP NO.33868 OF 2001

DISMISSED

19/02/2007

**SD/-
ANTONY DOMINIC, JUDGE**

//TRUE COPY//

P.A. TO JUDGE

ANTONY DOMINIC, J.

O.P NO. 33868 OF 2001

Dated this the 19th day of February, 2007

J U D G M E N T

Exhibit P1 is a re-tender notice issued by the 3rd respondent. Responding to Exhibit P1, petitioner quoted for the work at Sl.No.50 viz., "execution of work to protect the side of Kothamangalam river in Survey No.1381/3-5, 3-6 of Varappetty Village". The tender submitted by the petitioner was eventually accepted and this was conveyed to him by Exhibit P2. Exhibit P3 is described as the work order issued to the petitioner and it is seen from Ext.P3 that the agreement for the work in favour of the petitioner was accepted and was registered with the number indicated in Ext.P3. It is stated that subsequent to Ext.P3, Ext.P4 Power of Attorney was given by the petitioner appointing one Sri.George Joseph as his Power of Attorney. According to him, Exhibit P4 Power of Attorney was also accepted by the Department as per Ext.P5. Subsequently, as is evidenced by Exhibit R3(b), site was taken over by the contractor on 3/5/96. It is stated that thereafter the work commenced and was

completed in all respects by 6/7/1996. Reference to para 9 to 11 of the writ petition would disclose that the petitioner has in clear terms stated that the work was done under the supervision and control of the various officials of the department and that the progress of the work was known to each and everyone of them. Subsequent to the completion of the work, it would appear that based on the directions issued by this court in Exhibit P6(b) judgment in OP No.12233/96, a Public Interest Litigation, directing the District Collector to consider the complaint filed before him on the execution of the work awarded to the petitioner, Exhibit P6 notice was issued requiring the petitioner to appear before the District Collector for a personal hearing on 8/11/96. It is stated that the hearing was conducted as proposed in Exhibit P6, and Exhibit P6(a) order was issued by the District Collector on 6/12/96. In the aforesaid order, the District Collector ordered as follows:

- 1.The encroachment in Sy.No.1381/341 of Kothamangalam village will be evicted forthwith.

2.No amount shall be paid by the Irrigation Department for the execution of the construction of the retaining wall.

3.The Chief Engineer, Irrigation Department will be addressed to fix responsibility for the misuse of public money to encroach upon public property and to initiate disciplinary action against these responsible.

2. From the pleadings and documents annexed thereto, it would appear that on the basis of Exhibit P4 Power of Attorney, the Power of Attorney holder Sri.George Joseph is entitled to receive payments from the department and as payments were blocked consequent to Exhibit P6(a), the Power of Attorney holder pursued the matter with the Government by filing Exhibit P7 representation and also with the District Collector by Exhibit P9 application seeking review of Exhibit P6(a). As there was no response to the appeals so made by him, he filed OP 32044/2000 before this court which was disposed of by Exhibit P10 judgment directing consideration and disposal of Exhibit P7 representation. In pursuance to the direction thus issued by this court, the petitioner is seen to have been heard on 23/7/2001 and the

Government thereafter issued Exhibit P12 order rejecting Exhibit P7 representation. It was also ordered that a detailed enquiry shall be held by the Chief Engineer, Irrigation Vigilance to fix the responsibility on the then Assistant Executive Engineer and Executive Engineer of the Division for their lapses. It is challenging Exhibits P6(a) and P12 and declining payments that are due that this writ petition has been filed with a further prayer to direct the respondents 1, 3 and 4 to see that the dues to the petitioner under Exhibits P1 to P5 are released without further delay.

3. While admitting this writ petition, this court by order dated 6/12/2001 directed the respondents to file counter affidavit showing the admitted amounts, observing that while directing to fix responsibilities on the Engineers concerned, there was no order in Ext.P12 disentitling the petitioner from the contractual amounts.

4. Separate counter affidavits have been filed by the 2nd and 3rd respondents. The main thrust of the contentions as

reflected in the pleading of the respondents appear to be that it was the Power of Attorney Holder who executed the work and that the terms of the Power of Attorney, authorised the Power of Attorney holder only to receive payments on behalf of the contractor. It is stated that the work was executed by the Power of Attorney holder, Mr.George Joseph without the knowledge of the department or the officers concerned. According to the affidavit, the Power of Attorney Holder under the cover of the tender notice and without the knowledge or permission of the Department has unauthorisedly erected a granite wall in the land comprised in Survey No.1381/3AI of Varapetty Village and annexed 27 cents of land to the adjoining property belonging to to his father. It is stated that the construction is illegal and requires to be immediately demolished and that the unlawful encroacher has been evicted from the land. It is also stated that in pursuance to the direction of the District Collector, departmental enquiry was initiated against Sri.T.S.Krishna Pai, Assistant Executive Engineer and Smt.M.K.Sreevally, Assistant

Engineer, Sri.C.K.Prasad, 3rd Grade Overseer and Sri. Noushad, 3rd Grade Overseer. It is stated that Sri.T.S.Krishna Pai was imposed a punishment of censure while others were imposed punishment of withholding of one increment each with cumulative effect.

5. Thus the demand for payment for the work done is seen to be resisted on the ground that the work was unauthorisedly executed by the Power of Attorney holder and that under the cover of the work, puramboke land was reduced to the possession of the Power of Attorney Holder and was annexed to the land belonging to the Power of Attorney Holder's father. There is no controversy in any of the pleadings that the work was not executed on the alignment that was proposed by the department. Neither do I see any complaint about the quality of the work that was executed and it is a fact that despite the lapse of several years since its construction, the structure is not demolished so far. Such being the case the question whether payment for the work has to be released and if so, to whom, will

have to be considered. This writ petition though has been filed by the contractor himself, it is the Power of Attorney holder who is representing him. There is no dispute between the contractor and the Power of Attorney holder and the counsel for the petitioner tells me that payment can be released to either the contractor or the Power of Attorney Holder.

6. The contention of the department that the work was executed without the knowledge of concerned officers of the department also has been belied by the fact that the department itself has initiated action against the officers concerned which they would not have, had it been a case where they were aware of the work as pleaded by them. Not only that the duration of the work being two months, it is unrealistic to think that the work of this magnitude could have been completed without anybody's knowledge. Added to this, are the averments made by the writ petitioner in paragraphs 9 to 11 of the writ petition, where he narrates about the officers who had involved in the work and the frequency with which it was being supervised by them. These

averments will have to be appreciated in the light of the fact that it is unrefuted, in any of the counter affidavits or the statement filed by the respondents 2 and 3. It was pointed out to me that the P.W.D. Manual has not been complied with in the execution of work. However, the Government Pleader was not in a position to point out the agreement on the basis of which the contractor was liable to comply with the P.W.D. Manual.

7. What remains is the allegation of the respondents that under the cover of the work, about 27 cents of river puramboke was reduced by the Power of Attorney Holder into his possession and was annexed to his fathers property. In the reply affidavit filed by him and presented on 23/1/2006 in paragraphs 9 and 10 it is stated as follows:

9. I have no personal gains, so far as neither myself, nor my father, much less my grand-father own or possess even an inch of land either at the side or in the vicinity of the retaining wall constructed by me and completed on 6.7.1996. My grand father who died in 1963 had some land; which was purchased by Kothamangalam Fine Arts Society; which is in absolute possession and enjoyment of the said

Society. Therefore benefit of the retaining wall and kadavu is being derived by the public at large. The statement that the Varkey Ouseph had been evicted from the puramboke land on 22.12.1996, cannot stall be true and hence denied. The property belonged to Koruthu Varkey who had four children. Varkey Ouseph referred to in paragraph 4 was only one among them who had no separate possession and enjoyment over any portion of the so called properties alleged to have been encroached upon or situated at the side of the retaining wall.

10. I have done the work not to favour anybody, but as the Power of Attorney holder of the petitioner who had given me any number of public works to carry out the same on the Power of Attorney. While the work was in progress, people of the locality wanted the construction of a 'kadavu' at the site before completion of the retaining wall, and it was at the instance, mediation/ and supervision of 3rd and the 4th respondents that the kadavu was constructed; which is even now being used by more than 300 persons everyday. The Kadavu is situated at side of the properties of the Kothamangalam Fine Arts Society, which is the other beneficiary of the retaining wall and kadavu; apart from the public at large.

8. As against the above categorical averments so made in the affidavit, although the respondents have filed their additional counter affidavit only on 24/11/2006, they have not

refuted this averment. Such being the case, I do not see any reason why the assertion made in the reply affidavit should not be accepted.

9. However, one has to rule out any possibility of public interest being compromised. As far as the respondents are concerned, the only impediment in releasing the payment either to the principal contractor or to the Power of Attorney Holder apparently is this allegation. Hence the correctness of this statement made by the respondents in their counter affidavit and also the assertion to the contrary made in the reply affidavit has to be verified. For finding out the correctness of this disputed question, the District Collector can have the matter enquired into either by himself or through Tahsildar, Kothamangalam, within whose jurisdiction the area mentioned is situated. In such circumstances, I direct the District Collector to conduct an enquiry into the correctness of the averments made in paragraph 9 of the affidavit and extracted in paragraph 7 herein above. I am adopting this course of action for the reason that the fact

remains that the work has been completed and the awarder of the contract had no complaint that it is executed in any manner other than what they had wanted; either in design, alignment, or quality of work. It is also beyond controversy that the benefit of the work is being enjoyed by the general public. Such being the case, the respondents cannot take refuge under the technical plea that it was the Power of Attorney holder who did the work or that the P.W.D. Manual has not been complied with and refuse payment to both the contractor and the Power of Attorney holder.

10. This Original petition is disposed of directing the District Collector, Ernakulam-2nd respondent to conduct an enquiry as directed above either by himself or through the Tahsildar, Kothamangalam Taluk. In such enquiry, if the assertions made by the petitioner is found to be correct, the amount due for the execution of work as certified by the Irrigation Department shall be released to the principal contractor Mr.Able K.Kakkoor or the Power of Attorney holder. The enquiry as directed above shall be completed within a period of month of

OP 33868/2001

: 12 :

receipt of a copy of this judgment and payment if any, shall be released within a month thereafter.

O.P is disposed of as above.

ANTONY DOMINIC, JUDGE

Rp